IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.4285 OF 2006

Ahmed Abbas Sayyed. .. .. Petitioner
v/s.
Mrs.Zubedabi Mehmood Shaikh. .. Respondent

Mr.R.D. Soni i/by M/s.Ram & Co. for petitioner.

Mr.Girish Godbole for respondent.

CORAM : H.L. GOKHALE, J.

DATED : 9th January 2007

P.C. :

1. Heard the learned Counsel for the parties.

2. Rule. Rule is made returnable forthwith.

3. The petitioner herein is a brother of the respondent. They are having their houses adjoining to each other at village Vasind, Taluka Shahapur, District Thane. It appears that the father of these parties made a Gift Deed of the respective properties in September 1991. Accordingly, appropriate entries have also been made in the revenue record. The case of the petitioner is that while demarcating the property, the Taluka Inspector of the Land Records has made an erroneous division, whereby certain portion of the land which ought to fall on the part of the petitioner, has wrongly gone over to the

respondent. It is also his case that there is a small lane between the two houses, at the end of which there is a toilet and he wants an access to it. He has, therefore, filed a Suit in June 1999 for the necessary declaration.

4. It is material to note that as far as the use of the passage is concerned, there was an interim injunction granted which came to be vacated by the Lower Appellate Court.

5. The petitioner filed a Writ Petition in this Court which was heard by a learned Single Judge, who by her order dated 29th September 2005, noted that the petitioner had filed an Amendment Application in the Trial Court in the meanwhile and also that the petitioner wanted to move a fresh Interim Application after the amendment is granted. The learned Judge, therefore, disposed of the Petition by ordering that in the event the petitioner's Amendment Application is granted, he will be at liberty to file a fresh Interim Application and the Trial Court will decide that Application on its own merits. In the meanwhile, the respondent was directed to allow the petitioner to use the disputed lane for the purpose of going to the toilet.

6. The petitioner moved the necessary Amendment Application thereafter in September 2005. The petitioner has contended therein that although their father made the Gift Deed as claimed by both the parties, he amended the Gift Deed subsequently. It is his case that this amended Gift Deed is accepted by the respondent. This amendment is stated to have been effected in October 1995. The petitioner wants to substantiate his case on the basis of this amended Gift Deed.

7. The learned Judge of the Trial Court rejected this Amendment Application by his order dated 29th March 2006. In para-4 thereof, he observed that this is a development which had taken place prior to the filing of the Suit and, therefore, the petitioner ought to have brought it on record earlier and he should not be permitted to bring it now on record. It is this order which is under challenge.

8. Mr.Soni appearing for the petitioner submitted that this is an information which is necessary to be placed on record. In this behalf, he relies upon a judgment of the Apex Court in the

case of **B.K.Narayana Pillai vs. Parameshwaran Pillai & anr. reported in (2000) 1 SCC 712** where while deliberating on the provisions of Order VI Rule 17 of the Code of Civil Procedure, 1908, the Apex Court has held that an amendment of the pleadings should be permitted where it would result in solution of real controversy between the parties, though it should be without altering the cause of action.

9. Mr.Godbole appearing for the respondent emphasizes the fact that this is a prior development and that it should not be permitted to be brought on record. He, therefore, points out that this Amendment Application has been moved in September 2005 i.e. after the Miscellaneous Appeal filed by the respondent was allowed by the Lower Appellate Court on 10th of June 2005. In his submission, this after-thought should not be permitted.

10. I have considered the submissions of both the Counsel. It is material to note that though the parties are brother and sister, they are having their houses adjoining to each other. Both the petitioner and the respondent have been given certain portion of the property by their father.

It is the case of the petitioner that subsequent to the Gift Deed made by their father way back in September 1991, he has effected an amendment in October 1994. True it is that it could have been placed by the petitioner on record earlier itself. However, if this development is not to be permitted to be placed on record, that will lead to a decision without a very relevant document being examined by the Trial Court. As held by the Apex Court in the above case, such an amendment, if it is necessary to resolve the real controversy between the parties, should be permitted.

11. In my opinion, it is necessary to bring this aspect on record and the petitioner should not be denied this opportunity. At the highest, the petitioner should be made to pay the costs for this amendment to compensate the respondent for the delay which is resulting in disposal of the proceedings.

12. It is, however, told that the issues have not yet been framed in the Suit, though it is a Suit of 1999.

13. That being the position, in my view, the learned Judge of the Trial Court was in error in

not permitting the amendment which the petitioner had sought. The order passed on 29th March 2006 by the Civil Judge, Junior Division, Shahapur, will, therefore, stand quashed and set aside and the Application for amendment being Exhibit-53 will stand allowed.

14. Rule is accordingly made absolute on payment of costs of Rs.3,000/- to the respondent. It is only on payment of costs that the amendment will be permitted to be carried out. The petitioner will do the needful within two weeks hereafter.

15. Though the Petition is disposed of, now the petitioner will move a fresh Interim Application in the Trial Court, which, of course, will have to be decided on its own merits as directed by the learned Single Judge earlier by her order dated 29th September 2005 and in light of the amended Plaint, the respondent herein, of course, will have liberty to file an additional Written Statement to the amended Plaint.

16. Mr.Soni states that a fresh Interim Application will be moved within four weeks. The direction given by the learned Single Judge on 29th September 2005, namely, that the respondent shall allow the petitioner to use the disputed

lane for the purpose of going to the toilet will continue to operate in the meanwhile.

17. Petition stands disposed of.

(H.L. GOKHALE, J.)